STATE OF VERMONT

SUPERIOR COURT
ADDISON UNIT

CIVIL DIVISION
Docket No. 72-4-20 Ancv

AERIE POINT HOLDINGS, LLC,
Plaintiff,

v.

VORSTEVELD FARM, LLP,
Defendant

Order: Motion for Relief from Judgment (Motion #24)

A Judgment was issued on August 15, 2022 enjoining Defendant Vorsteveld Farm LLP from discharging water from the drain tile system on its agricultural fields into a downslope ditch from which the water flowed onto Plaintiff's adjacent land, causing harm from erosion, sediment deposits, and contaminants.[1] The Judgment was not timely appealed.[2]

Vorsteveld Farm LLP (hereinafter "Farm") has filed a Motion for Relief from Judgment pursuant to V.R.C.P. 60 (b)(5), claiming that it is "no longer equitable that the injunction should have prospective application."[3] In its Reply to Aerie Point's opposition, the Farm alternatively seeks to invoke Rule 60 (b)(6), which authorizes relief for "any other reason justifying relief from the operation of the judgment." It seeks an evidentiary hearing and a site visit.[4]

The threshold issue is whether the Farm has set forth sufficient factual and/or legal grounds for conducting an evidentiary or other hearing, as no hearing is warranted unless there has been a sufficient allegation of changes in fact or law as the basis for meeting the standard set forth in the Rule. *Sandgate School District v. Cate,* 2005 VT 88 ¶ 12 ("when a court finds that the explanations offered by a party are unreasonable, it is within its discretion to deny the motion without a hearing")(citation omitted). Rule 60(b) is not intended to function as a substitute for a timely appeal. *Donley v. Donley,* 165 Vt. 619 (1996) at 619-620 (quotations and citations omitted).

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[1] "Defendant is enjoined from allowing water, and any particles it carries, from flowing from the discharge points of Defendant's drain tile system into the public ditches and culverts westerly of Defendant's land on Arnold Bay Road between Adams Ferry Road and Pease Road." Judgment, August 15, 2022.

[2] *Aerie Point Holdings LLC v. Vorsteveld Farm* LLC, 22-AP-279, 2023 WL 2867097 (Vt. April 7, 2023)(unpublished mem.)

[3] The full provision of Rule 60(b)(5) which provides a basis for relief from a judgment is "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

[4] Aerie Point has filed a Motion for Contempt for failure to comply with the injunction, and that motion has been scheduled for an evidentiary hearing.

For the reasons set forth below, the court determines that sufficient grounds have not been alleged, and therefore the motion is denied without a hearing or site visit.

Alleged changes in factual circumstances.

The Farm represents that a "post-judgment event" is that the EPA is pursuing an enforcement action against it for restoration of wetlands that have been affected by the Farm's drain tile system. However, the Farm has not presented facts supporting the proposition that any EPA enforcement requirements, which have not yet been determined, would be inconsistent with the terms of the injunction. On the contrary, it appears that some possible proposals for compliance with EPA enforcement could be compatible with the injunction. For example, the Farm represents that EPA wants water from the drain tile system to go to restore wetlands (rather than sending it into the ditch where it causes erosion, sedimentation, and contamination on Plaintiff's property). There are no facts to suggest that such a goal or process conflicts with the injunction, which is designed to protect Plaintiff's property from the discharges from the Farm's drain tile system.

Moreover, EPA's first letter to the Farm was dated December 8, 2021 (Exhibit A to Motion). The trial had started, but was scheduled to continue in January, and concluded on January 11, 2022. Post-hearing memos were not due until January 31, 2022. The Decision issued on March 28, 2022, and thereafter the court and parties had considerable communication concerning the specific terms for the injunction. See Entry Order of May 17, 2022 and followup. EPA's Second Request was dated June 24, 2022 and called for a response within 30 days. Judgment did not issue until August 15, 2022, following a conference with the attorneys. The issue of EPA enforcement had not been an issue, and no timely post-judgment motion was filed seeking to alter or amend the judgment pursuant to V.R.C.P. 59 (e). Thus, the EPA's pursuit of enforcement could have been raised with the court prior to the Judgment becoming final. The fact of the EPA enforcement action is not a post-judgment change in circumstances.

The affidavit of Mark Bannon attached to the Farm's motion as Exhibit B indicates that the Farm's expert who is working on a response to the EPA enforcement action has "considered" various possibilities for compliance with the injunction, including, for example, capturing the discharged water and trucking it to a different location; constructing dams and pumps, plugging the drain tile system, and removing the drain tile system. His conclusion that they are "impractical and unsustainable" is a general conclusion only, without any specific facts or explanation. No facts are offered to show that there is no strategy that would be able to satisfy both the injunction and the EPA. There is simply a lack of evidence to support a conclusion that the existence of the EPA enforcement action is a post-judgment event that calls for modification or elimination of the injunction.

The Farm alleges that there is no longer grazing of animals on Aerie Point land, apparently suggesting that Plaintiff no longer suffers harm from the Farm's discharged water. While it is true that the court found that water from the Farm's tile drain system flooded Aerie Point pastureland in a manner that seriously interfered with the ability of Plaintiff's tenant

Scuttleship Farm to pasture animals (Decision at 7), that was one of only many different and harmful consequences found by the court to have been caused by the Farm's discharge of water, sediment, and contaminants onto Aerie Point land. Decision, page 17. The fact that the pasturing of animals is not taking place currently does not undo the facts found by the court that the Farm's discharge of water harms Aerie Point's land in multiple ways. *Id.*

The Farm represents that the effects of previous erosion on Aerie Point land have been "resolved," and focuses on the fact that at specific locations where there had been significant soil erosion (such as around the base of a fencepost), there is now growing vegetation. Highlighting the current condition of limited locations on Aerie Point land does not sufficiently address the multiple ways in which the water that is discharged from the drain tile system has caused harm to Aerie Point land and limited the use of the land, and is likely to continue to do so as long as the discharges continue. There are no facts showing that there has been any change in the manner in which water, sediment, and contaminants discharged from the drain tile system flow on to Aerie Point land. Thus the potential remains for the continuation of: seriously eroded streambeds cutting into the surface of Aerie Point land, flooding of Aerie Point fields, deposits of muck along the shoreline of Lake Champlain on the Aerie Point shoreline, and stimulation of algae growth on the Aerie Point shorefront.

Finally, the Farm argues that it has discovered that compliance with the injunction would be expensive and make it unable to continue "to operate as a second-generation family farm," (Motion at 2) and that the court did not intend to have such an effect. In Defendant's Motion it is opined that "[t]his Court did not intend for its injunction to completely upend Vorsteveld Farm's farming operation or severely burden Vorsteveld Farm so as to make farming impracticable, let alone effectively to drive this three-family, second-generation dairy farm toward dissolution and ruin." Motion at 9.

That is not an accurate representation of the court ruling. In the Decision, the court cited the law established by the Vermont Supreme Court rejecting the principle of the "doctrine of comparative equities" (in which the economic effect on the offending party may be balanced against the hardship to the harmed party). Decision, pages 25-29. The law of the case is that the court does not balance the equities between the parties in a manner that allows considerations of expense to the offending party to override the need for a remedy to the harmed party. An injunction is justified if continuation of the offending party's conduct is harmful to the plaintiff.

The full context of the provision cited by the Farm is:

> However, the court has determined that the nuisance is caused not by the use of drain tiles *per se* but by the failure of the farm to dispose of the excess water containing farm waste that its system produces and discharges onto Aerie Point land. There is no need to enjoin the entire enterprise--only the disposal of the water that is in excess of normal drainage amounts and that contains the byproducts of its drainage system, i.e. sediment and contaminants.

Decision at 29.

In searching for the specific terms of an injunction, the court was looking to have the least financial impact that was reasonable consistent with providing the necessary relief to Aerie Point. Thus, the focus was on preventing the discharge of water from the drain tile system into the ditch that would carry the water to Aerie Point land. The Farm was (and is) free to determine the means for accomplishing that objective. However, just because the Farm has discovered that it may be costly to do so does not justify modification or elimination of the injunctive remedy. Accordingly, the fact that it may be expensive to comply with the injunction does not constitute a change in factual circumstances such that the injunction is no longer necessary.

Alleged changes in legal circumstances.

In its motion, the Farm's attorney represents that the Farm's

> technical team. . .anticipates that it will be impossible for Vorsteveld Farm to comply with both this Court's injunction and any mitigation plan that the EPA would approve because if the tile-drain water is needed to feed a jurisdictional wetland, then removing this water would be contrary to federal jurisdiction and actually harm or impair water intended to support a wetland (and other down gradient wetlands) over which the federal government potentially maintains jurisdiction.

Motion at 6. Citation is to ¶¶ 10-11 in the Affidavit of Dori Barton attached as Exhibit C. Those paragraphs do not support the proposition that EPA federal jurisdiction over wetlands would make it impossible to comply with the injunction in the Judgment in this case. On the contrary, a reasonable reading of those paragraphs suggests the possibility of compatibility between a possible solution to the EPA enforcement action and implementation of the injunction.[5] The highly generalized representation is not supported by the affidavit and moreover neither any affidavit nor legal argument supports the proposition that federal preemption has changed the legal landscape such as to prevent compliance.

In the motion, it is suggested that Vorsteveld Farm is being held "to a different standard than other farms in Vermont, which benefit from statutory 'protection from nuisance lawsuits' in conducting 'agricultural activities.'" The Farm argues that a statutory change that took effect on June 1, 2022, following the Decision, changes the legal landscape applicable to farms.

The statutory amendment adds the following two provisions to the definition of "agricultural activities" : "subsurface drainage of farm fields" and "[operation of farm machinery and equipment], "including irrigation and drainage systems." 6 V.S.A. § 4802(10) (added provisions in quotation marks).

[5] The paragraphs suggest that water from the drain tile system might be redirected to the wetlands mitigation site rather than be directly discharged into the ditch. The actual components of such a proposal are not sufficiently identified, and thus do not support the proposition that federal preemption has changed the legal landscape such as to prevent compliance.

The Farm argues that because 12 V.S.A. § 5372 (4) incorporates definitions of agricultural activity from 6 V.S.A. § 4802(10) for purposes of 6 V.S.A. § 5373, the law has changed to specifically permit drain tile systems as agricultural activities protected by the provision in the Right to Farm law that specifies a rebuttable presumption against nuisance suits. It argues that "the effect of this legislation henceforth may prevent any court in the future from reaching the same conclusion as in the Decision." Motion at 11. It further argues that "it would be grossly inequitable to continue holding Vorsteveld Farm to a higher standard, a standard to which no other farm in Vermont will be held in the future."

In the Decision, the court did not fault Vorsteveld Farm for using subsurface drain tiles. Indeed, the remedy analysis makes clear that from the perspective of Aerie Point as a downslope abutter, the Farm may continue to use drain tiles as long as it finds a means of disposing of the water and sediment discharged from its system other than on to Aerie Point land. The analysis set forth on pages 18-21 of the Decision regarding the applicability of the rebuttable presumption would not change as a result of the statutory amendment. Thus the legal circumstances have not changed, and the Farm will not be treated differently than other farms as a result of the statutory amendment.

In the Farm's Reply, it is stated simply that the federal Clean Water Act preempts state water law. It appears that this is an argument that the legal landscape has changed. However, the exhibits show that EPA began its investigation into the issue of effect on wetlands before the trial had concluded and before the Judgment issued. Moreover, the statement of preemption is a general conclusory statement without an analysis of what may be involved in this situation, in which both federal water law and state property law (and specifically remedies) may apply. How they intersect would call for a more specific analysis. It would be premature for the court to conclude that EPA involvement has automatically changed the legal landscape to such an extent that the state law remedy of an injunction cannot stand.

The court cannot conclude based on the content of the Motion that there has been a change in applicable law that would support no longer giving prospective application to the injunction.

Conclusion.

On page 12 of the Motion, the Farm asks the court "to amend its injunction to provide that Defendant will not directly discharge its tile drain water into the Arnold Bay Road ditch." It suggests that strict compliance with the injunction as written may not be necessary as there may be other solutions to meet the objectives of the injunction. It identifies the use of "stone pillars" as a possibility, but argues that it "has not implemented this practice because it has been unclear if this would satisfy the injunction but could certainly do so if it knew that this would meet the terms of the injunction. To do so, however, without a lack of clarity would be like a blindfolded game of darts." Motion at 13.

The court is open to the idea that there may be alternative methods for achieving the objective of the injunction. Conceptually, with specific factual information, grounds could

potentially exist that would support an amendment. It is not inconceivable that a future amendment might be warranted. However, grounds have not been shown for either the elimination of the injunction or for the specific amendment requested. The proposed amendment to one that would only enjoin the discharge of water "directly" into the ditch is not only not supported with facts but it does not define a standard suitable for enforcement for the purpose of preventing harm to Aerie Point land.

The court cannot conclude that there has been a sufficient showing that the standard required by Rule 60 (b)(5) could be met with evidence. The analysis applies equally to the request for relief under Rule 60 (b)(6).

For the foregoing reasons, the Motion is *denied.*

Electronically signed September 21, 2023 pursuant to V.R.E.F. 9 (d).

Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned